LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUN 1 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 96

HURON PORTLAND CEMENT COMPANY,
a Michigan corporation,
Appellant,
vs.
CITY OF DETROIT, a Michigan municipal corporation,
BENJAMIN LINSKY, Chief, Bureau of Smoke
Abatement, P. J. LAREAU,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE
OF MICHIGAN

JURISDICTIONAL STATEMENT

ALFRED E. LINDBLOOM,
Attorney for Appellant,
1100 Ford Building,
Detroit 26, Michigan.

Of Counsel:
CHARLES WRIGHT, JR.,
LAURENCE A. MASSELINK,
1100 Ford Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

INDEX

	Page
Reports of Opinions Below	1
Jurisdictional Grounds	2
Questions Presented	6
Statement of the Case	7
Raising the Federal Questions Below	11
The Federal Questions are Substantial	12
This Case is Within the Jurisdictional Provisions Relied on and the Cases Cited to Sustain Jurisdiction	21
Conclusion	22

APPENDIX

"A"—Opinion of the Supreme Court of Michigan	1a
"B"—Opinion of the Circuit Court for the County of Wayne, Michigan	10a
"C"—Decree of the Supreme Court of Michigan	23a
"D"—Decree of the Circuit Court for the County of Wayne	24a

TABLE OF CASES

Breard v. Alexandria, 341 U. S. 622	3
Charlestown Federal Savings & Loan Association v. Alderson, 324 U. S. 182	11
Fiske v. Kansas, 274 U. S. 380	3
Gibbons v. Ogden, 9 Wheat. 1	13
Jamison v. Texas, 318 U. S. 413	3, 21
Independent Warehouse v. Scheele, 331 U. S. 70	3

	Page
Kelly v. Washington, 302 U. S. 1	12, 19
King Manufacturing Co. v. Augusta, 277 U. S. 100	3, 21
Morgan v. Virginia, 328 U. S. 373	17
Napier v. Atlantic Coast Line Railroad, 272 U. S. 605	15
Poulos v. New Hampshire, 345 U. S. 395	3, 21
Service Storage and Transfer Co. v. Virginia, 79 S. Ct. 714	14
Southern Pacific v. Arizona, 325 U. S. 761	18, 20
Staub v. City of Baxley, 355 U. S. 313	3
West Point Grocery Co. v. Opelika, 354 U. S. 390	3

CONSTITUTION

The Constitution of the United States:	
Art. I, Sec. 8, Cl. 3	7

STATUTES

28 U. S. C. 1257 (2)	2, 21
45 U. S. C., Secs. 22-34	14
46 U. S. C., Sec. 392	12
46 U. S. C., Chap. 14	6
70 St. 224	12

DETROIT ORDINANCE

Ordinance No. 167-E, Chap. 14 of the Municipal Code of Detroit, 1954:	
Sec. 2.2A of said ordinance	3
Sec. 2.16 of said ordinance	4, 14
Sec. 2.17 of said ordiannce	4, 14
Sec. 2.20 of said ordinance	5, 14
Sec. 2.21 of said ordinance	6
Sec. 3.2 of said ordinance	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.....

HURON PORTLAND CEMENT COMPANY,
a Michigan corporation,
Appellant,
vs.
CITY OF DETROIT, a Michigan municipal corporation,
BENJAMIN LINSKY, Chief, Bureau of Smoke
Abatement, P. J. LAREAU,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

REPORTS OF OPINIONS BELOW.

The opinion of the Supreme Court of the State of Michigan is reported in 355 Mich. 227 and 93 N. W. 2d 888 (1959). A copy of that opinion is attached hereto as Appendix "A". The Wayne Circuit Court of the State of Michigan, the court of first instance, rendered an opinion which is not reported. A copy of that opinion is attached hereto as Appendix "B".

JURISDICTIONAL GROUNDS

1. This is an appeal from a decision of the Supreme Court of the State of Michigan. Appellant brought suit against the City of Detroit and the other appellees to enjoin the enforcement of the Smoke Ordinance of the City of Detroit (being ordinance No. 167-E, Chapter 184 of the Municipal Code of the City of Detroit, 1954) against it, except when the emission of the prohibited smoke is caused by improper firing or by improper use of the equipment upon its vessels on the grounds that the Smoke Ordinance is repugnant to the Constitution and laws of the United States.

The ordinance in controversy, through its inspection and penalty clauses, prohibits the use of appellant's vessels with their present equipment, although such vessels are engaged in interstate commerce and are inspected and licensed by the United States Coast Guard and are enrolled with the Bureau of Customs of the United States Treasury Department and licensed by it to engage in the coasting and foreign trade.

2. The opinion and decree of the Supreme Court of the State of Michigan was rendered and entered on the 12th day of January, 1959.

A notice of appeal to this Court was filed by the appellant with the Clerk of the Circuit Court for the County of Wayne, Michigan (that being the Court possessed of the record) on April 9, 1959.

3. The jurisdiction of this Court upon appeal is conferred by 28 U.S.C., Sec. 1257 (2). Appellant challenges the validity of an ordinance of the City of Detroit, Michigan, "a statute of the state" within the meaning of 28 U.S.C. 1257 (2), on the ground that as applied to appel-

lant's activities it is repugnant to the Constitution and laws of the United States and the decision of the highest state court to which an appeal could have been taken was in favor of validity.

4. Cases believed to sustain the jurisdiction of this Court on appeal are:

King Manufacturing Co. v. Augusta, 277 U. S. 100 (1928);
Jamison v. Texas, 318 U. S. 413 (1943);
Poulos v. New Hampshire, 345 U. S. 395 (1953);
West Point Grocery Company v. Opelika, 354 U. S. 390 (1956);
Independent Warehouse v. Scheele, 331 U. S. 70 (1947);
Staub v. City of Baxley, 355 U. S. 313 (1958);
Breard v. Alexandria, 341 U. S. 622 (1951);
Fiske v. Kansas, 274 U. S. 380 (1927).

5. The ordinance here involved, is ordinance No. 167-E and is Chapter 184 of the Municipal Code, City of Detroit, 1954. This is a comprehensive ordinance seeking to prohibit the emission of the kinds of smoke, dust, fumes, etc. defined in the ordinance. The ordinance is lengthy and most of its provisions are not questioned in this suit. The provisions that are involved are hereinafter set forth.

Section 2.2A of the ordinance, p. 514, of the Detroit Municipal Code, 1954, provides:

> "It shall be unlawful within the City of Detroit for any person, firm or corporation to permit the emission of any smoke from any source whatever of a density equal to or greater than that density described as No. 2 of the Ringlemann Chart; Provided, That the following exceptions to the provisions of this section shall be permitted:

"(a) Smoke, the shade or appearance of which is equal to but not darker than No. 2 of the Ringlemann Chart for a period, or periods, aggregating four minutes in any 30 minutes;

"(b) Smoke, the shade or appearance of which is equal to but not darker than No. 3 of the Ringlemann Chart for a period, or periods, aggregating three minutes in any 15 minutes, when building a new fire or when breakdown of equipment occurs such as to make it evident that the emission was not reasonably preventable."

Section 2.16 of the same ordinance, p. 518 of said Code, provides:

"It shall be unlawful for any person, firm or corporation to use or operate any furnace or other combustion equipment or device which is subject to annual inspection, as hereinafter set forth, without a certificate of operation; provided, however, that if application for such certificate of operation has been made and the required inspection fee paid, it shall be lawful to use such furnace or other fuel-burning equipment or device until receipt of such certificate or until notification by the Bureau of its refusal to grant such certificate."

Section 2.17 of the same ordinance, p. 518 of said Code, provides:

"Every furnace or other combustion equipment or device shall be inspected annually and a report and permanent record made of such inspection by the Bureau except the following:

"(1) Furnaces or other combustion equipment or devices installed to heat buildings used exclusively for private residences containing less than three dwelling units or flats, and

'(2) Combustion equipment or devices used exclusively for private residences which do not contain a central heating plant."

Section 2.20 of the same ordinance, p. 518 of the Detroit Municipal Code, provides:

> "After any owner, agent, occupant, manager or lessee of any premises has been previously notified of three or more violations of this Ordinance within any consecutive 12-month period, in respect to the emission of smoke, soot, cinders, noxious acids, fumes, gases, fly ash or industrial dusts, the owner, agent, occupant, manager or lessee of said premises shall be notified to show cause before the Commissioner not less than ten days from the date of notice, why the equipment causing such violation should not be sealed.
>
> "(a) The notice herein provided for may be given by mail directed to the last known address of the party to be notified, or if said party or his whereabouts is unknown, then by posting a notice on or near the premises at which the violations shall have occurred. Upon said date said violator may appear and be heard. Upon such hearing, if the Commissioner finds that adequate corrective means and methods have not been employed to correct the cause of such condition then it shall be his duty to seal said equipment until such time as a permit and certificate as herein provided have been applied for and issued for said plant.
>
> "(b) It shall be unlawful for any person to break a seal of any refuse burning equipment, any boiler or any equipment or device producing heat or power, that has been duly sealed by the Commissioner or his authorized representative."

Section 2.21 of the same ordinance, p. 519 of the Detroit Municipal Code, provides:

> "When a certificate of operation is refused in the case of an original inspection or a case of an annual inspection, the Commissioner is authorized to seal, immediatey, the furnace or other combustion equipment until the owner, lessee or other person required to procure the certificate of operation shall have complied with the provisions of this Ordinance."

Section 3.2 of the same ordinance, p. 521 of the Detroit Municipal Code, provides:

> "Any person, persons, firm, partnership, association or corporation or any one acting in behalf of said person, persons, firm, partnership, association or corporation violating any of the provisions of this Ordinance shall upon conviction thereof be subject to a fine or not more than one hundred dollars ($100.00) or to imprisonment in the Detroit House of Correction for a period of not more than thirty (30) days, or to both such fine and imprisonment in the discretion of the court. Each day that a violation of this Ordinance is continued or permitted to exist without compliance shall constitute a separate offense punishable upon conviction in the manner prescribed in this section."

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Where Congress has by Statute 46 U.S.C., Chapter 14, provided for the inspection and licensing of vessels engaged in interstate and foreign commerce on the Great Lakes and appellant's vessels, which are engaged in interstate commerce, have been inspected by the United States Coast Guard and have been granted permission to navigate on the Great Lakes and have been enrolled and li-

censed by the Treasury Department of the United States to carry on coasting and foreign trade, is the Smoke Ordinance of the City of Detroit, Michigan valid as to said vessels, when such ordinance provides for the inspection of the boilers on the vessels and prohibits their use, and are the penalty provisions of said ordinance valid as to appellant's vessels when the prohibited smoke cannot always be prevented by the boilers inspected, approved and licensed by the United States?

2. Where the Smoke Ordinance of the City of Detroit, Michigan provides for the inspection of combustion equipment and prohibits use of certain kinds of boilers and equipment on vessels engaged in interstate and foreign commerce on the Great Lakes, and prohibits the emission of smoke which cannot be prevented at all times with boilers and equipment commonly used on the Great Lakes, does such ordinance unduly burden interstate and foreign commerce in matters where uniformity is necessary under the Commerce Clause of the United States Constitution, Article I, Section 8, Cl. 3?

STATEMENT OF THE CASE

The bill of complaint, filed in this case, sought to enjoin the appellees from prosecuting two criminal cases brought against appellant under the Smoke Ordinance and to enjoin the enforcement of said ordinance against appellant, except when the emission of the prohibited smoke is caused by improper firing or by the improper use of the equipment upon appellant's vessels. The bill claimed that the Commerce clause of the Constitution of the United States gave Congress full and complete authority to regulate and control foreign and interstate commerce and that Congress had exercised such control in respect to steam vessels engaged in interstate commerce on the Great Lakes.

It was further alleged that appellant's fleet consisted of four steamships equipped with hand fired scotch marine boilers and one motor vessel, which is diesel powered, and that the emission of the kind of smoke prohibited by the Smoke Ordinance could not at all times be prevented on the vessels equipped with hand fired scotch marine boilers.

The pleadings and the testimony disclosed that, at the time of trial, appellant had acquired one more steamship equipped with hand fired scotch marine boilers and that all of said vessels were periodically inspected by the United States Coast Guard. There was introduced in evidence as Plaintiff's Exhibit "2" a Certificate of Inspection issued by the United States Coast Guard in respect to appellant's steam ship, S. T. Crapo, which Certificate, after describing the vessel, contained the following language: "The said vessel is permitted to be navigated for one year on the Great Lakes." The testimony disclosed that there was such Certificate for each vessel.

There was also introduced as Plaintiff's Exhibit "A" a Consolidated Certificate of Enrollment and License issued by the Treasury Department of the United States, Bureau of Customs, in respect to appellant's steamship John W. Boardman. This Certificate and License contained the following language: "License is hereby granted for said vessel to be employed in carrying on the COASTING AND FOREIGN TRADE for ONE YEAR from the date hereof and no longer." Such Certificate and License had been issued for each vessel.

The Supreme Court of Michigan in its opinion states: "It is conceded that the vessels operate in interstate commerce" (App. A, p. 2a). The said vessels are used to transport bulk cement from appellant's mill at Alpena, Michigan to its distributing plants in various cities on the

Great Lakes in Michigan, Ohio, New York, Minnesota and Wisconsin. The trial court in its opinion says: "It is agreed it is impossible to prevent emission of the kind of smoke prohibited by the smoke ordinance if the vessel is equipped with hand fired scotch marine boilers" (App. B. p. 12a).

The testimony shows that all of the appellant's vessels are self-unloaders and that it is necessary to unload bulk cement with these self-unloaders; otherwise, an excessive amount of dust is caused. It also appeared that it is necessary to keep up full steam during the unloading operations and that when the fire is cleaned it is impossible to prevent the kind of smoke prohibited by the Ordinance.

One of the criminal cases sought to be enjoined was against the appellant, the captain and chief engineer of the John W. Boardman and the other was against the appellant, the captain and chief engineer of the S. T. Crapo. In both of the criminal cases the appellees claim that the Smoke Ordinance was violated while the vessels were docked and unloading.

In its bill of complaint, appellant alleges that at that time the firing was proper and the emission of the smoke complained of could not have been prevented with the equipment on the vessels. Appellees, in their answer (par. 9) admit that at the time of the violation on Steamship John W. Boardman it was found that the equipment was properly used. In respect to Steamship S. T. Crapo, appellee Lareau was refused access to the vessel and could not state whether or not the equipment on said vessel was properly used during the period of violation.

Appellant, in its bill of complaint, alleges that appellees claim that the Smoke Ordinance is applicable to its fleet and that appellees have threatened to enforce the ordi-

nance even when the objectionable smoke cannot be prevented with the present equipment. The testimony indicated that the ordinance could be complied with if oil burning equipment is substituted for the hand fired scotch marine boilers or in all likelihood if a well designed underfeed stoker is added. The testimony showed that it would cost roughly $70,000 to equip either the Steamship Boardman or the Steamship Crapo with stokers and at least $100,000 each to equip them with oil burning equipment.

At the trial, appellant urged that its equipment had been approved by the United States Coast Guard under the Acts of Congress and had been licensed to engage in the coasting and foreign trade upon the Great Lakes and that the City of Detroit could not constitutionally enforce against it, the Smoke Ordinance which could be complied with only if appellant substituted other equipment. Appellant contended that Congress had pre-empted the field through the enactment of statutes governing the inspection and licensing of steamships engaged in interstate commerce on the Great Lakes and that the Smoke Ordinance unduly burdened interstate commerce in matters where uniformity is necessary and that the Ordinance was unconstitutional under the Commerce Clause even if Congress had not expressly pre-empted the field.

After trial of the matter, the trial court filed a written opinion which is attached hereto as Appendix "B" and entered a decree dismissing the bill of complaint. Upon appeal to the Supreme Court of Michigan (the court of last resort), that Court affirmed the decision of the trial court and its opinion is annexed hereto as Appendix "A".

RAISING THE FEDERAL QUESTIONS BELOW

The constitutional points which appellant raises on this appeal, were initially raised by the pleadings. Appellant attacked the validity of the ordinance in question in its bill of complaint as being repugnant to the Commerce Clause of the United States and the laws of the United States. The court of first instance, dismissed the bill of complaint.

The fact that the Federal questions were adequately and properly raised was recognized by the Supreme Court of Michigan in its Opinion. It said:

> "In the exercise of its constitutional power to control interstate commerce the Congress of the United States has provided for extensive control and inspection of American vessels on the Great Lakes. It is the contention of appellant that by such legislation Congress has pre-empted the field and that therefore the ordinance in question is invalid." (App. A, p. 2a.)

The Supreme Court of Michigan also said:

> "Appellant also argues that whether or not Congress has expressly pre-empted the field of smoke abatement, the Detroit ordinance unduly burdens interstate and foreign commerce in matters where uniformity is necessary." (App. A, p. 6a.)

This Court will accept the recognition by the state court that the Federal questions were properly raised in that court. *Charlestown Federal Savings and Loan Association v. Alderson*, 324 U. S. 182 (1945).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Appellant here attacked the validity of the ordinance on the grounds that, as to appellant's fleet, it is repugnant to the Commerce Clause of the Constitution of the United States and the laws of the United States.

Kelly v. Washington, 302 U. S. 1, 4 (1937). In speaking of the Congressional regulations of navigation, it was said:

> "The federal acts and regulations with respect to vessels on the navigable waters of the United States are elaborate. They were well described in the argument of the Assistant Solicitor General as a maze of regulation. Provisions with respect to steam vessels are extremely detailed."

46 U.S.C., Sec. 392 provides that the Coast Guard shall inspect each year the boilers, unfired pressure vessels * * * equipment, etc. of vessels subject to inspection, other than passenger vessels. This Act was amended by Act of June 4, 1956, 70 St. 224, to provide for the bi-annual inspection of vessels and the last sentence of Subsection (c) of this section is as follows:

> "No boiler, unfired pressure vessel or appurtenance thereof shall be allowed to be used if constructed in whole or in part of defective material or which because of its form, design, workmanship, age, use, or for any other reason is unsafe."

The United States Coast Guard, after inspecting appellant's fleet, granted each vessel a Certificate of Inspection, which included the following: "The said vessel is permitted to be navigated for one year on the Great Lakes." Each vessel was enrolled with the Bureau of Customs, Treasury Department of the United States and was granted

a Consolidated Certificate of Enrollment and License, which included: "License is hereby granted for the said vessel to be employed on the COASTING AND FOREIGN TRADE for ONE YEAR from the date hereof and no longer."

Gibbons v. Ogden, 9 Wheat 1 (1824):

> "The word 'license' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the rights which the grantor can transfer, to do what is within the terms of the license."

Admittedly, Congress under the Commerce Clause has authority to control interstate commerce and the two licenses, above referred to, under the *Gibbons* case transfer to appellant's vessels the right to navigate the Great Lakes. The licenses include the right to use the vessels as equipped when inspected and when enrolled.

Can a municipality, through an ordinance, even though designed to prevent excessive smoke, subject the equipment on these same vessels to inspection and forbid their use until a certificate of operation is issued, and may a municipality punish criminally the owner of such vessels for the emission of smoke which cannot be prevented with the equipment upon the vessel when licensed?

It is clear that the Detroit ordinance can be complied with by most of appellant's fleet *only* if the equipment on those vessels is changed. The penalty provision of this ordinance is, certainly, in conflict with the licenses because the licensee is, and can be punished for doing that which cannot be prevented with the license equipment.

The City of Detroit has not so far attempted to enforce the inspection provisions, Sec. 2.16 and 2.17 of the ordinance against vessels. However, if the ordinance is held valid, the City will, no doubt, insist that vessels be inspected and inasmuch as it is conceded that the prohibited smoke cannot be prevented by the equipment on the vessels, it follows that the Certificate of Operation provided for in Sec. 2.16 would not issue. Hence, the vessels could not be operated at all, although granted permission by the United States to engage in navigation upon the Great Lakes.

Under Sec. 2.20 of the ordinance, if the owner has been notified of three or more violations of the ordinance in any consecutive twelve month period, the equipment must be sealed, unless it is found that adequate corrective means and methods have been employed to correct the cause of the condition. Here, again, if this provision is enforced and it, undoubtedly, will be if the ordinance is held valid, the vessels could not be used even though licensed by the United States.

Serrice Storage and Transfer Co. v. Commonwealth of Virginia, 79 S. Ct. 714 (1959). Petitioner had been granted a certificate by the Interstate Commerce Commission to engage as a motor carrier between certain points. Freight from and to points in Virginia was routed through West Virginia. Virginia claimed that this was a sham and, that, the petitioner was guilty of engaging in intrastate freight business without permission and fined the petitioner $3,500. Held:

> "To uphold the criminal fine here assessed would be tantamount to a partial suspension of petitioner's federally granted certificate."

This Court has had occasion to pass upon the Boiler Inspection Act, Secs. 22-34 of Title 45, U.S.C., which provides

for inspection of railroad locomotives. That Act is quite similar to the Act governing the inspection of steamships. It was there held that Congress had pre-empted the field and states cannot validly enact statutes requiring certain equipment, even though the Interstate Commerce Commission had made no order in respect to this equipment.

Napier v. Atlantic Coast Line Railroad, 272 U. S. 605 (1926). In Georgia a statute was passed requiring automatic fire doors on locomotives and in Wisconsin another statute was passed requiring cab curtains during the winter. It was held that both of these statutes were void even if the Interstate Commerce Commission had made no order requiring a particular type of fire door or cab curtain, holding that the Boiler Inspection Act conferred upon the Interstate Commerce Commission the exclusive power to specify the sort of equipment to be used on locomotives.

The Court said:

> P. 612: "Did Congress intend that there might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?
>
> The federal and state statutes are directed to the same subject—*the equipment of locomotives.* They operate upon the same subject. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of

> the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standards set by the Commission must prevail, requirements of the states are precluded, *however commendable or however different their purpose.*" (Emphasis added.)

There has been discussed so far the question of whether Congress under the Commerce Clause has by its acts concerning navigation and steamships pre-empted the field to the extent of precluding a municipality from enacting an ordinance which indirectly regulates the equipment which may be used on steamships. There has also been discussed the question of whether a municipality may indirectly prevent the use, in interstate commerce and navigation, of a steamship licensed by Congress to engage in interstate commerce. Both of these questions are substantial and are of extreme importance to vessels engaged in navigation upon the Great Lakes.

In the Supreme Court of Michigan, in this case, there were several *amicus curiae* briefs filed. One was filed on behalf of Lake Carriers' Association. In this brief, it was stated in a footnote: "At the close of the 1957 navigation season the combined Canadian (282 vessels) and United States (415 vessels) Great Lakes commercial fleet totaled 697 vessels, including carferries and passenger steamers. While the accurate figures are not available, it is estimated that of the total fleet, 463 burned coal for fuel, 277 being hand fired, of which 256 have hand fired scotch marine boilers." Undoubtedly, a great many of these vessels dock at Detroit or pass through waters within the boundary of the City of Detroit, to-wit, the Detroit River. Hence, the validity of this ordinance, as applied to steam vessels

engaged in interstate commerce, is extremely important as the cost of converting those vessels to equipment required to comply with the Detroit ordinance is almost fantastic.

There still remains one other Federal question which is also substantial. Assuming that Congress has not preempted the field to the extent of precluding this ordinance, and if the City of Detroit may enforce the provisions of this ordinance in spite of the licenses above referred to, there still remains the question of whether this ordinance unduly burdens interstate commerce in matters where uniformity is necessary.

It is apparent that if this ordinance is valid, other municipalities or states along the Great Lakes could pass different and varying smoke ordinances. Thus, a vessel might have equipment which would enable it to comply with the ordinance of the City of Detroit, but Chicago, Toledo or some other city could pass an ordinance with different requirements. It is no practical answer to say that a vessel should install the equipment which will enable it to comply with the most severe ordinance, since it could then comply with all, because if one complies with the most severe ordinance at a given time, one more severe may be passed. There is included in this thought the belief, that one is safe because if a more severe ordinance is passed, the courts would hold the later one unreasonable, but, of course, that does not follow, courts can and do differ, so while one court might hold the later ordinance unreasonable, another might not, all of which goes to show that this is a question which requires uniformity of treatment.

Morgan v. Virginia, 328 U. S. 373, 377 (1945). The provisions of the Virginia Code required separation of white and colored passengers on both interstate and intrastate

motor carriers. The claim was made that this statute burdened interstate commerce, contrary to the Commerce clause even if Congress had enacted no legislation on the subject. The state claimed that this statute was passed under the police power to avoid friction between the races. The Court held the statute unconstitutional as applied to interstate passengers or vehicles moving in interstate and said:

> "There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the Constitutional sense of useful in accomplishing a permitted purpose. *Where uniformity is essential for the functioning of commerce a state may not interpose its local regulation.*" (Emphasis added.)

Southern Pac. v. Arizona, 325 U. S. 761 (1945). Arizona statute limited passenger trains to fourteen cars, freight trains to seventy cars. The Court said, p. 773:

> "Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application."

> Page 775: "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the state enacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal

points before entering and after leaving the regulating state. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent."

Kelly v. Washington, 302 U. S. 1 (1937). Here the State of Washington passed a comprehensive and complete Code of Inspection and Regulation of every vessel operated by machinery "which is not subject to inspection under the laws of the United States." The Court said, p. 14:

> "*Third.* The remaining question is whether the state law must fall in its entirety, not because of inconsistency with federal action, but because the subject is one as to which uniformity of regulation is required and hence, whether or not Congress has acted, the State is without authority. *Cooley v. Board of Wardens*, 12 How. 299, 319; *Minnesota Rate Cases*, 230 U. S. 352, 399, 400.
>
> "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, *Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States.* The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on." (Emphasis added.)

The burden on interstate commerce in the three cases above cited is less severe than the burden upon interstate commerce in the case at bar. The burden on interstate commerce in this case is extremely severe since it is un-

disputed that it will cost from about $70,000 to $100,000 per vessel to supply the equipment needed to comply with the Detroit ordinance. If it is remembered that other cities or governmental units may pass other statutes or ordinances requiring different equipment, the cost is prohibitive.

The Detroit ordinance here involved is certainly a direct burden on interstate commerce because it says, in effect, through its penalty and inspection clauses that a vessel may not be used in interstate commerce unless and until such vessel has that equipment which will enable it to meet the requirements of the Detroit ordinance. To argue that the Detroit ordinance only incidentally or indirectly affects interstate commerce and navigation is to lose sight of the fact that the ordinance as effectively prohibits the use of a vessel equipped with hand fired scotch marine boilers as if it directly provided that no vessel engaged in interstate commerce shall pass through the Detroit River if it is equipped with a hand fired scotch marine boiler. The Detroit ordinance affects interstate commerce beyond the boundaries of Detroit also, because if equipment is installed in vessels to comply with the Detroit ordinance, that same equipment must be used at all times by the vessel since the equipment cannot practically be removed when the vessel leaves Detroit. This is one of the points made in the case of *Southern Pacific v. Arizona*, 325 U. S. 761 (1945).

The decision of the Supreme Court of Michigan sustaining the validity of the Detroit Smoke Ordinance should not be permitted to stand in open defiance of the existing pronouncements of this Court. The effect of that decision is to prohibit the use in interstate commerce of a large percentage of the steamships navigating the Great Lakes. The effect of that decision is also to render practically worth

less the licenses granted by the Federal Government and it takes from Congress the right to control the vessels engaged in interstate commerce.

THIS CASE IS WITHIN THE JURISDICTIONAL PROVISIONS RELIED ON AND THE CASES CITED TO SUSTAIN JURISDICTION

This appeal is taken pursuant to 28 U.S.C., Sec. 1257 (2) which confers appellate jurisdiction upon this Court to review final judgments by the highest court of a state in which a decision could be had when there is drawn in question the validity of a state statute on the grounds of it being repugnant to the Constitution and the laws of the United States and the decision of the state court is in favor of validity.

This Court has many times held that a "statute" within the ambit of *28 U.S.C.*, Sec. 1257 (2) means more than a state law enacted by the general legislative authority and that it encompasses municipal ordinances, municipalities being political subdivisions of the state. *King Manufacturing Co. v. Augusta*, 277 U. S. 100 (1928); *Jamison v. Texas*, 318 U. S. 413 (1943); *Poulos v. New Hampshire*, 345 U. S. 395 (1953).

There can be no question that the judgment of the Supreme Court of Michigan is a final judgment. The decree in favor of the appellee in the trial court entered after a trial upholding the validity of the ordinance was affirmed by the Supreme Court of Michigan, the highest Court in Michigan in which a decision can be had.

CONCLUSION

Appellant respectfully suggests that this appeal brings before the Court federal questions under the Constitution and laws of the United States, which are far reaching and important in terms of legal principle and practical impact on navigation, interstate commerce and the control thereof and the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for the resolution.

Respectfully submitted,

ALFRED E. LINDBLOOM,
Attorney for Appellant,
1100 Ford Building,
Detroit 26, Michigan.

Of Counsel:
CHARLES WRIGHT, JR.,
LAURENCE A. MASSELINK,
1100 Ford Building,
Detroit 26, Michigan.

APPENDIX "A"

STATE OF MICHIGAN—SUPREME COURT

OPINION OF THE SUPREME COURT OF MICHIGAN

(Filed January 12, 1959)

BEFORE THE ENTIRE BENCH.

VOELKER, J.

The defendant city of Detroit has a comprehensive ordinance (No. 167-E) entitled "Smoke Abatement Code" which provides that it shall be unlawful within that city to permit the emission of smoke of a density equal to or greater than that described as No. 2 Ringlemann Chart (a standard accepted way of measuring the density of smoke). This ordinance allows certain temporary exceptions which are not now relevant. It also provides that after an owner has been warned of 3 violations within a 12 month period the commissioner, a city official, shall serve notice on the owners and seal the offending equipment unless he finds that adequate corrective steps have been taken. It also provides for the inspection of equipment and for fines and imprisonment for failure to comply with the ordinance.

On December 20, 1955 the city of Detroit filed complaints in the traffic and ordinance division of the recorder's court thereof against plaintiff-appellant, owner of the steamships John W. Boardman and S. T. Crapo for allowing the emission of dense smoke at the port of Detroit contrary to the provisions of the ordinance in question.

Appellant then filed suit in circuit court to enjoin the city of Detroit and the other defendants from prosecuting

the complaints, and an order was entered granting such an injunction during the pendency of this suit. Thereafter in circuit court the plaintiff claimed that the ordinance was unconstitutional as to it except in those instances where the objectionable smoke is caused by improper firing or by the improper use of the equipment on the vessel. It is conceded that the vessels operate in interstate commerce. The trial court held that the ordinance was constitutional and that it was a necessary and reasonable exercise of the local police power. From a decree to that effect plaintiff has appealed.

In the exercise of its constitutional power to control interstate commerce the Congress of the United States has provided for extensive control and inspection of American vessels on the Great Lakes. It is the contention of appellant that by such legislation Congress has preempted the field and that therefore the ordinance in question is invalid.

The relationship between state and congressional power to control interstate commerce is well stated in 15 C. J. S., Commerce §11, p. 268 as follows:

> "However, the constitutional grant to congress of power to regulate interstate commerce, although operating of its own force to curtail state power in some measure, does not forestall all state action affecting interstate commerce; it does not withdraw from the states power to legislate in respect of their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce. Although state legislation affects interstate commerce incidentally, indirectly, or remotely, yet where it does not undertake to regulate such commerce and is no more than a *bona fide*, legitimate, and reasonable exercise of the reserved police power of the state in respect of a matter of local or internal concern, it is valid and * * * will stand,

in the absence of conflicting and superseding legislatio by congress in the exercise of its superior authority to regulate commerce among the sfates. * * *"

Appellant's first question on appeal thus falls naturally into 3 parts: 1: Does the ordinance conflict with any federal legislation? 2: Does it seek to regulate interstate commerce? 3: Is it a reasonable exercise of local police power?

To determine the first part of that question we must look at the scope and intent of the congressional legislation and then examine the ordinance in question to see if it pertains to the same subject matter. The federal legislation cited in appellant's brief, U. S. C. A., Title 46, Ch. 14, is, so far as we can determine, intended primarily for the protection and safety of vessels and their passengers, crew and cargo. None of the federal legislation in this field is to our knowledge designed or enacted for the protection of persons and property on land. Appellant has cited none in its brief. (See 1951-52 O. A. G., p. 370 to the effect that the United States Coast Guard so interprets the applicable federal legislation.) It appears to us that the ordinance and the federal legislation deal with basically different subject matter and are thus not in such conflict that the former must bow.

A quick glance at the title of the ordinance, "Smoke Abatement Code," is sufficient to learn its intent. Even the most casual reading of it indicates clearly that its sole purpose is to protect the health and welfare of the residents of Detroit by preventing the emission of dense smoke into the air which the people must breathe.

Thus paragraphs 2 and 3 of the preamble to the ordinance provide:

> "Whereas, the excessive emission of dense smoke within the corporate limits of the City of Detroit and the resultant effect upon the public health and welfare require the adoption of a comprehensive and integrated plan of smoke control; and
>
> "Whereas, in conjunction with the smoke control program it is desirable to adopt appropriate regulations to reduce air pollution caused by excessive soot, cinders, fly ash, dust, noxious acids, fumes and gases, the emission of which is detrimental to the health and welfare of the residents of the City; now, therefore,"

We think the ordinance before us is clearly aimed at the prevention of air pollution and not at any regulation of interstate commerce. If it affects interstate commerce at all we think it is only indirect and accidental.

Little need be said on the subject of whether or not this ordinance is a reasonable exercise of local police power. We think that by now it is sufficiently clear without citation of authority that excessive air pollution by dense smoke cannot be anything but harmful to the health and welfare of a community. Indeed in 1955 Congress appropriated $5,000,000 a year for 5 years for research into and control of the increasingly vexing problem of air pollution. (We also note that the first national conference on air pollution was held in Washington, D. C. during November, 1958. The National Cancer Institute is presently studying the problem but as of this writing has announced no results. See science section of Saturday Review for November 8, 1958.)

We note further that the preamble to the above mentioned congressional appropriation statute says in part:

> "* * * it is declared to be the policy of Congress to preserve and protect the primary responsibilities

> and rights of the States and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies and other public or private agecies and institutions in the formulation and execution of their air pollution abatement research programs. * * *" USCA, Title 42, Ch. 15B, §1857.

Regarding this appropriation statute appellant correctly states in its reply brief:

> "* * * In that Act Congress was not attempting to give up its inspection of vessels, locomotives, motor carriers and other things that might conceivably cause or be involved in smoke pollution."

That however is not the question before us. The point is that the ordinance does not seek to supersede or replace any existing provisions of Congress either in the realm of air pollution or for the inspection of vessels, as already noted. Its purpose is simply to control to some extent the emission of unnecessary smoke in a community so as to protect the health and welfare of its inhabitants. The portion of the statute quoted above indicates to this Court that the ordinance in question is not only a reasonable exercise of local police power but that such actions by local authorities have the recent blessing and financial encouragement of Congress itself.

On the other hand we reluctantly realize that the pastoral pine-scented days of yore are gone forever, and that our society has become dependent upon vast conglomerates of power of which smoke is all to frequently an unwanted by-product. Thus the elusive question of the reasonableness of such local legislation boils down to one of rela-

tivity. An ordinance of this type may be said to be reasonable only if it does not unduly hamper industry and our continual need for power. It does not follow, however, that if we cannot have smokeless cities that men must compose themselves and dwell in an ever-deepening pall of smoke. If this ordinance sought to prevent the emission of all smoke, or if adequate means of smoke control were not available, then a different question might be before us. But this ordinance concededly seeks to outlaw only the emission of smoke of such density that can readily be prevented by the use of modern smoke control equipment. All it costs is money. We find and hold that the ordinance in question is a reasonable exercise of the local police power and as such does not unduly interfere with interstate commerce.

Appellant also argues that whether or not Congress has expressly pre-empted the field of smoke abatement, the Detroit ordinance unduly burdens interstate and foreign commerce in matters where uniformity is necessary. Appellant bases its arguments on this score primarily on the fear that local legislation might be inconsistent, that is, that upon meeting Detroit's ordinance it may in the future have to change its equipment again to meet even stricter requirements at some other port. This is a clear possibility we certainly do not deny. We do not see however why this ordinance should be held invalid simply because of the possibility that another ordinance might another day be enacted in another place that is even more stringent. Sufficient unto the day is the evil thereof; we will endeavor to cross that smoke-fogged bridge when we come to it. We do not discern it in this case.

As noted, if appellant meets only the minimum requirement of this ordinance it might very well become a burden on it to meet more stringent future requirements as they

are enacted. Because of this possibility it would have us strike down the present ordinance. We suggest that such a burden might be avoided if appellant sought to meet the spirit rather than the letter of this present ordinance. This could concededly be done by installing modern equipment and available processes of firing that would reduce smoke to the least possible density. If some future ordinance goes beyond this appellant or someone in its shoes might have a better and a more persuasive basis for a claim of unreasonable burdensomeness.

In an analogous case involving a Georgia statute that required the use of a certain type of headlight on railroad engines, the United States supreme court spoke as follows in answer to arguments strikingly similar to those presented in this case (Atlantic C. L. R. Co. v. Georgia, 234 U. S. 280):

> "In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal action, the use of such agencies, which, unless carefully guarded, was fraught with danger to the community, should go unregulated, and that the states should be without authority to secure needed local protection. The requirements of a state, of course, must not be arbitrary, or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state, in the exercise of a similar power, may not impose the same regulation, * * *
>
> "If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced,—

> if there appears to be need of standardization of safety appliances, and of providing rules of operation which will govern the entire interstate road, irrespective of state boundaries,—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the state, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress, in its control of interstate commerce, to establish such regulations as, in its judgment, may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

We concede that this subject is one that might well call for uniform legislation of federal scope, but until that happens we are not persuaded that our citizens must patriotically gag, choke and grope with obedient resignation until that happy day arrives. Nor are we persuaded that short of any such uniform legislation that local governments are in the meantime powerless to make a proper exercise of their police power.

Appellant cites McMorran v. Cleveland-Cliffs Iron Co., 253 Mich. 65, where this Court reversed that portion of the chancellor's decree below restraining as a nuisance the smoke from the stacks of certain coal-burning lake vessels while tied up at a coaling dock at Port Huron. No smoke ordinance was there involved; the opinion does not indicate that further smoke abatement was there readily available; the plaintiff householders there had moved into the area after these conditions had already long existed; and the smoke from the lake vessels was but a fraction of the general smoke, soot, dust and noise which had long existed, emanating mostly from stationary industrial

installations. Our opinion there indicates that the smoke from the vessels was but a reasonable incident of navigation. That case and others cited by appellant are not controlling of our decision here.

The judgment below is affirmed, but without costs, both a public question and public legislation being involved.

APPENDIX "B"

CIRCUIT COURT FOR THE COUNTY OF WAYNE,
IN CHANCERY

OPINION OF THE CIRCUIT COURT FOR THE COUNTY OF WAYNE, MICHIGAN

(Filed April 18, 1957)

Plaintiff manufactures and sells cement, with a mill at Alpena, Michigan, and distributing plants at Detroit, Saginaw and Muskegon, Michigan, Toledo and Cleveland, Ohio, Buffalo and Oswego, New York; Duluth, Minnesota and Milwaukee and Green Bay, Wisconsin. It maintains a fleet of vessels to transport bulk cement from the Alpena mill to the distributing plants, the fleet consisting of the steamships John W. Boardman, S. T. Crapo, Samuel Mitchell, E. M. Ford, and the motor vessel Paul H. Townsend. An additional steamship, E. C. Collins, will be added to its fleet within a year or two. All of the vessels with the exception of the motor vessel Paul H. Townsend, which is diesel powered, are equipped with hand-fired scotch marine boilers.

Steamships John W. Boardman and S. T. Crapo are self unloaders, the power being supplied by boilers; the Samuel Mitchell has its unloading equipment operated by electricity from shore installations; only three docks have such shore installations so the Samuel Mitchell calls only at these ports. The E. M. Ford has a diesel motor which powers the unloading equipment.

The City of Detroit's smoke abatement ordinance, No. 167-E, provides that it shall be unlawful within the city

for any person, firm or corporation to permit the emission of smoke of a density equal to or greater than density described as No. 2 on the Ringlemann Chart, with the exception that smoke equal to No. 2 is permitted for a period or periods aggregating four minutes in any 30 minutes, and smoke equal to No. 3 on the Ringlemann Chart is permitted for a period or periods aggregating three minutes in any 15 minutes when building a new fire or the like.

The ordinance provides for annual inspection of combustion equipment or furnace used, with some exceptions, and makes it unlawful in Section 2.16 to use such equipment without a certificate of operation which issues only after inspection. Section 2.20 provides that after any owner has been previously notified of three or more violations within any consecutive twelve-month period, the commissioner shall serve a notice upon the owner and shall seal the equipment unless the commissioner finds that adequate corrective means have been employed to correct the unlawful emission. A fine of $100 or imprisonment in the Detroit House of Correction for a period of not more than thirty days, or both, such fine and imprisonment, are provided. Each day that a violation of the ordinance is continued or permitted shall constitute a separate offense.

On December 20, 1955, two suits were started in the Recorder's Court for the City of Detroit, Traffic and Ordinance Division, naming the company as defendant as well as Kenneth Sanehagrin, Captain, and Arthur Johnson, Chief Engineer, of the S. S. Crapo; J. Burke, Captain of the S. S. John W. Boardman; Edward Pugh, Chief Engineer, of the Boardman. Suit K 996-600 charged that the John W. Boardman emitted smoke from its stack for a period of nine minutes between 10:42 A. M. and 11:02 A. M., on December 12, 1955, while docked at the foot of Riopelle Street in the City of Detroit, and suit No. K 996-601, charged the S. S. Crapo emitted dense smoke for a period

of 9¾ minutes between 11:49 A. M. and 12:03 P. M., the same day at the same location.

Plaintiff herein brought suit to enjoin the City of Detroit from prosecution of its two suits in Recorder's Court and an order was entered against the city to "desist and refrain from the further prosecution of the two cases now pending against plaintiff and others" and "from issuing any tickets or warrants for arrest or in any manner attempting to enforce said ordinance No. 167-E" against "plaintiff, the officers, members of the crews of its vessels, unless the emission of said smoke be caused by improper firing or by improper use of the equipment upon said vessel."

It is conceded that the equipment on the John W. Boardman was properly used but the City can not state whether the equipment was properly used on the S. T. Crapo since representatives of the City were refused admission to board this vessel.

It is agreed it is impossible to prevent emission of the kind of smoke prohibited by smoke ordinance if the vessel is equipped with hand-fired scotch marine boilers. The Boardman has two boilers each with two doors and one steam air jet over each door. The Crapo has three boilers, each with two doors and one steam air jet over each door. The steam jets being installed at the suggestion of Benjamin Linsky, former Chief of the Bureau of Smoke Abatement for the City.

Testimony showed also that the plaintiff used a chemical in an attempt to reduce the smoke. Plaintiff urges it has done everything that it could possibly do with the equipment it has to prevent the emission of smoke. It was shown on trial that the fleet is subject to periodic inspection by the coast guard, which issues a search of inspection.

The Crapo in 1955, docked at Detroit twenty-two times for an average docking time of 23.9 hours and the Boardman docked at Detroit 25 times that year with an average stay of 16.2 hours. Both vessels were constantly engaged in interstate and foreign commerce during this period.

Plaintiff claims that the smoke abatement ordinance is unconstitutional as to it except in those instances where the objectionable smoke is caused by improper firing or by the improper use of the equipment on the vessel.

HAS CONGRESS PRE-EMPTED THE FIELD?

Plaintiff argues that Congress has pre-empted the field through the enactment of elaborate and detailed regulations of steam vessels. *46 U. S. Code Annotated,* Sec. 932 Sup., provides that the coast guard shall inspect, before such vessels are put into service and at least once every two years thereafter, the boilers on unfired pressure vessels and appurtenances thereto; the propelling and auxiliary machinery, electrical apparatus and equipment of all vessels are subject to inspection.

It is argued that since Congress has validly enacted such statutes and regulations, a state or municipality may not pass a statute or ordinance covering the same field. *Kelly v. Washington,* 1937, 302 U. S. p. 1. Hand-fired scotch marine boilers have been approved by the coast guard. Smoke of the kind prohibited by the ordinance can not be avoided, hence the ordinance prohibits the use of a hand-fired scotch marine boiler.

The City, it urges, requires a certain kind of equipment to comply with its ordinance, other and different equipment than that which the Congress has provided may be used.

Reference is made also by analogy to the *Boiler Inspection Act*, Secs. 22-34 of Title 35, *U. S. Code Annotated*, relating to the inspection of railroad locomotives. *Napier v. Atlantic Coastline Railroad*, 1928, 272 U. S. 605.

The City, on the other hand, urges that the Congress has not enacted laws which provide for the protection of persons and property on land, including regulations of fuel and smoke-producing characteristics of equipment as a result of its use, and that, therefore, there is no conflict with federal regulations and the ordinance. There are devices and appliances which, if installed, would enable the plaintiff to comply, and this compliance may be required.

Under the Home Rule Act, M. S. A. 5.20732 and 5.2083, the police power of Detroit as a home rule city is of the same general scope and nature as that of the State and the ordinance is not directed, as are the federal regulations, to the protection of the vessels, its passengers, crew and freight. *Morgan v. Virginia*, 90 Law Ed. —, 165 A. L. R. 574. This is a case, it is urged, where Congress has not acted, and although the ordinance affects interstate commerce it is valid.

COURT'S HOLDING

The Court has reviewed the authorities cited in the excellent briefs of the parties, and it is our holding that the federal Congress has not pre-empted this particular field. The constitutional grant to Congress of the power to regulate interstate commerce, it has frequently been held, does not forestall all state action and does not prevent a state from legislating on a matter of local concern, even though interstate commerce may be indirectly and incidentally affected, provided the Congress has not seen fit to enact superseding legislation. *15 C. J. S.*, Commerce, Sec. 11, p.

268; *Cheboygan Lumber Co. v. Delta Transportation Co.*, 100 Mich. 16; *Burrows v. Delta Transportation Co.*, 106 Mich. 582; *Smith v. Alabama*, 124 U. S. 465; *Nashville, C. & St. Louis Railway Co. v. Alabama*, 128 U. S. 96, 177 U. S. 584; *H. P. Welch & Co. v. State of New Hampshire*, 306 U. S. 79.

These cases are constructions of statutes and ordinances affecting railroads and motor vehicles and are in point, the Court believes, as authority for the validity of the ordinance so far as the doctrine of federal pre-emption is concerned.

The language of the United States Supreme Court in the Welch case, which involved a New Hampshire statute declaring unlawful the operation on state highways of motor vehicles for specified transportation by drivers who have been continuously on duty for more than twelve hours, is persuasive.

It can not be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. In construing federal statutes enacted under the power conferred by the commerce law of the Constitution, it should never be held that Congress intends to supersede or suspend the exercise of the reserve powers of the state, even where that may be done, unless and except so far as its purpose to do so is clearly manifested.

Congress has not seen fit to regulate the emission of smoke by vessel in interstate commerce so far as such emission affects persons and property on land. Congress, therefore, has not pre-empted this particular field so as to exclude state regulation.

DOES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION ITSELF PRECLUDE THE ENACTMENT OF DETROIT'S SMOKE ABATEMENT ORDINANCE?

Plaintiff argues that a city other than Detroit could pass a smoke ordinance which would prohibit the use of even oil equipment, and other municipalities could pass even different and conflicting ordinances with which it would be impossible for plaintiff to comply. It is a field, therefore, it is urged, where uniformity is necessary in a constitutional sense in accomplishing a permitted purpose. *Morgan v. Virginia, supra.* Where uniformity is necessary, it is said, even though Congress has not acted, the Constitutional clause, or the power given by that clause to Congress, preempts or occupies the field and precludes a state or municipality from legislating in respect to anything requiring uniformity.

It would cost roughly $70,000 to equip either the Boardman or the Crapo with stokers, and at least $100,000 each to equip them with oil burning equipment. So the burden upon interstate commerce is very substantial and it is prohibitive if other cities pass conflicting or different ordinances. *Southern Pacific v. Arizona,* 1945, 325 U. S. 761; *Kelly v. Washington, supra.*

Plaintiff has cited a portion of the Supreme Court opinion in the Kelly case which represents a good statement of its position:

> "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels,

and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on. But it does not follow that in all respects the state act must fall.

* * * * * *

"If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises."

Plaintiff urges that the congressional regulation of motor driven vessels is much less complete than that of a steam vessel; that even though the regulation of motor driven tugs was very incomplete, the Supreme Court indicated a state could not impose particular standards as to design, equipment and operation because those requirements, if imposed at all, must be through the action of Congress, which can establish a uniform rule.

The City of Detroit argues, on the other hand, that the smoke abatement code is not such a law as requires uniformity of regulation. Reference is made to Public Act 159, enacted by the Federal Congress in 1955, wherein it is provided in Section 1:

"That in recognition of the danger to public health and welfare, injury to agricultural crops and livestock, danger to, and danger of property and hazards to air and ground transportation, from air

> pollution, it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the states and local governments in controlling air pollution."

Reference is also made to Volume 2, U. S. Code; *Congressional News*, 1955, pp. 2459 and 2461, states:

> "The bill does not propose any exercise of police power by the Federal Government and no provision in it invades the sovereignty of States, counties, or cities. There is no attempt to impose standards of purity.
>
> * * * * *
>
> "Moreover, unlike the water-pollution field in which a similar board now exists, instances of troublesome interstate air pollution are few in number and no federal legal control over interstate air pollution is currently proposed."

Reliance is placed upon *Atlantic Coastline Railroad v. Georgia*, 234 U. S. 290, construing a Georgia law requiring railroad locomotive operating on the main lines to be equipped with electric headlights of 300 watt power and to have reflectors of a certain dimension, wherein the Supreme Court stated in upholding the law said:

> "The requirements of a state, of course, must not be arbitrary or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state in the exercise of a similar power may not impose the same regulation."

Here a congressional Act had provided for locomotive brakes, ladders, grab irons and other safety requirements.

Reliance was similarly placed on certain motor vehicle cases; *Morris v. Duby*, 274 U. S. 135; *Maurer v. Hamilton*, 309 U. S. 598, as well as state regulations of seagoing vessels, *Kelly v. Washington, supra.*

Summarizing these cases the City argues that the Supreme Court will not hold a state or local law invalid because (1) different states would require different devices, or (2) the fact that a state may change the law requiring further changes in equipment, or (3) because the Federal Government has entered the field, unless the local law is proved to be in direct conflict with the federal regulations.

COURT'S HOLDING

The Court has reviewed the authorities cited by the parties and concludes that the constitutional control by the Federal Government of interstate commerce does not preclude a smoke abatement ordinance such as here involved where the Federal Congress has not seen fit to pass specific legislation calculated to protect property and persons on land, as opposed to regulations for the protection of crews and passengers as well as vessels and freight on vessels in interstate commerce,

While it is conceivable that uniformity of regulation through an act of Congress might be desirable, it is not a subject on which local authority may not legislate to meet local needs. It is readily conceivable that local situations require different and particular provisions depending upon the needs and the problems encountered by the local authorities.

The state regulatory measures upheld as to vessels in interstate commerce and as to railroads and motor vehicles in interstate commerce incline the Court to such a view: Smoke abatement does not, at this stage of scientific development, admit of only one system or plan of regulation but is a subject, it is believed, which requires diversity of treatment to meet local exigencies.

IS THE SMOKE ABATEMENT ORDINANCE A VALID EXERCISE BY THE CITY OF DETROIT OF ITS POLICE POWER?

It is well established that a considerable discretion is vested in legislative authority to determine not only what the interests of the public require but what measures are necessary for the protection of these interests. New subjects may be embraced within the police power as changing conditions require. *People v. Sell,* 310 Mich. 305, 316.

Considerable latitude is allowed for differences of view and possible peculiar conditions. *Safee v. City of Buffalo,* 198 N. Y. S. p. 649; *Cady v. City of Detroit, supra.*

> "The court is required, if it can consistently do so, to give to the provisions such a reasonable construction as will sustain it. It has no right to invade the legality province. Its power is confined to those cases in which a municipal ordinance is clearly and manifestly made to appear to be unreasonable or oppressive in its operation. (*Building Comm. v. Kunin,* 181 Mich. 611.)

The Court may concern itself only with the question of whether the legislative authority, assuming it has the power to enact a regulation, has so arbitrarily and capriciously exercised that power as to make the regulation unreasonable, in deprivation of the constitutional rights of the complaining parties. *Red Star Motor Drivers' Assn. v. Detroit,* 234 Mich. 398.

The emission of smoke has been subject to lawful regulations for many years. *People v. The Detroit White Lead Works, et al.,* 82 Mich. 471; *People v. Lewis,* 86 Mich. 273; *People v. Detroit, Belle Isle & Windsor Ferry Co.,* 187 Mich. 177.

The general subject matter having been regulated lawfully, the question here is whether the particular regulation, establishing a standard of proscribed smoke emission, namely, "density equal to or greater than the density of No. 2" of the Ringlemann Chart is permissible, and reasonably related to the purposes of the ordinance. This standard has been sustained in the State of New Jersey. *Atlantic City v. France*, 65 Atl. 894, affirmed, 70 Atl. 163. This case on appeal, however restated the old law that a common law nuisance must still be proved to convict under the ordinance.

The case of *Board of Health of Weehawken Twp. v. New York Central R. R. Co.*, 90 Atl. 2d, 729, recognized the proposition that it is not necessary to prove that air pollution results in a public nuisance in order to have it prohibited by ordinance, and upheld the standard of No. 2 of the Ringlemann Chart as a reasonable standard for proscribed smoke, even though the particular activity does not result in a public nuisance.

COURT'S HOLDING.

It is the view of this Court that the ordinance here, making unlawful the emission of smoke of a certain density is necessary and reasonable, and a valid exercise of local police power.

Scientific development in the field of smoke abatement, it is believed, has reached that point where a legislative authority may determine that smoke of a particular density should be prohibited in the interests of the safety, health and welfare of the general public. This exercise of legislative judgment should not be subject to judicial supervision unless plainly beyond the legitimate exercise of police power. We do not believe that Detroit's smoke

abatement ordinance is an arbitrary or unreasonable exercise of police power.

That conformity to the requirements established by the City will require the discontinuance by plaintiff of some of its present equipment does not render the ordinance constitutionally offensive. *People v. Consolidated Edison Co., of New York,* 116 N. Y. S. 2d, 555; *Northwestern Laundry v. Des Moines,* 239 U. S. 486, 60 Law Ed. 396; *Burrows v. Delta Transportation Co., supra.*

It is, therefore, held that Ordinance 167-E, of the City of Detroit is constitutional.

A permanent injunction is denied.

George E. Bowles,
Circuit Judge.

Dated: April 17, 1957.

APPENDIX "C"

IN THE SUPREME COURT OF MICHIGAN.

DECREE OF THE SUPREME COURT OF MICHIGAN

(Filed January 12, 1959)

This cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, in Chancery, and having been argued by counsel, and due deliberation had thereon, it is now ordered, adjudged and decreed by the Court, that the decree of the Circuit Court for the County of Wayne, in Chancery, be and the same is hereby in all things AFFIRMED. And it is further ordered, adjudged and decreed that no costs be awarded herein.

APPENDIX "D"

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE,
IN CHANCERY

DECREE AND ORDER DISMISSING BILL OF COMPLAINT

At a session of said Court held in the City-County Building in the City of Detroit, County of Wayne, State of Michigan, on May 1, 1957.

Present: Honorable George E. Bowles, Circuit Judge.

This cause having come on to be heard upon the bill of complaint and answer thereto and proofs taken therein in open Court and the matters in issue having been argued by counsel for the respective parties and the Court being fully advised in the premises, and the Court having filed an opinion which by reference is made a part hereof, finding that the plaintiff is not entitled to the relief prayed for in its bill of complaint and that Ordinance 167-E is constitutional.

Therefore, upon motion of the attorneys for defendants,

It is ordered, adjudged and decreed that the bill of complaint filed in said cause on behalf of plaintiff be dismissed and plaintiff's prayer for permanent injunction be denied, with costs to the defendants to be taxed.

George E. Bowles,
Circuit Judge.

A true Copy:
Edgar M. Branigin, Clerk.
By Barney Barthowiak, Deputy Clerk.